In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 332

CLARENCE STUDEMEYER, PETITIONER

v.

JOHN W. MACY, JR., CHAIRMAN, U. S. CIVIL SERVICE COMMISSION; ROBERT E. HAMPTON, MEMBER, U. S. CIVIL SERVICE COMMISSION; LUDWIG J. ANDOLSEK, MEMBER, U. S. CIVIL SERVICE COMMISSION

and

EUGENE M. ZUCKERT, SECRETARY OF THE AIR FORCE OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner brought suit in the United States District Court for the District of Columbia seeking to set aside his discharge from civilian employment with

the Air Force. The district court denied relief but the court of appeals, acting in light of this Court's decision in *Williams* v. *Zuckert*, 372 U. S. 765, remanded the case to the district court with instructions (320 F. 2d 797, 798):

> to hold a hearing and determine whether the petitioner, desiring the presence of witnesses at his hearing, either discharged his initial burden under the applicable regulations by making timely and sufficient attempt to obtain their presence or, under the circumstances and without fault of his own, was justified in failing to make such attempt, and, if so, whether proper and timely demand was made upon the Air Force so that it was required to produce such witnesses for cross-examination. Upon making such determination, the District Court shall thereupon enter such further order or judgment as may be appropriate.

On remand, the district court, noting that both sides asserted that there was no genuine issue of fact, considered cross-motions for summary judgment and rendered judgment in favor of respondents. 228 F. Supp. 411. Noting petitioner's concession that the civil service employees whose presence at the hearing petitioner sought were in fact present and that one of them testified, and that these were the only witnesses mentioned in the complaint, the district court was disposed to grant judgment for respondents without more. 228 F. Supp. at 412. Nevertheless, the court, addressing itself to petitioner's present contention that his complaint ought to be considered as

amended (Pet. 9-10), considered petitioner's claim that he had requested additionally the presence of certain military personnel at the hearing (228 F. Supp. 412-414). Upon a review of petitioner's conduct in attempting to secure the attendance of these witnesses, it concluded that he had failed to make a timely and sufficient attempt and that the failure was his own responsibility (*id.* at 414). Petitioner's only request to the agency for the attendance of military personnel was made of a civilian personnel officer who advised petitioner that he would have to obtain his own witnesses. Petitioner made no efforts to secure the attendance of these military witnesses through military authorities, and, while petitioner did assert that certain witnesses refused to appear voluntarily, this was never made known to the agency. Moreover, petitioner failed to advise the hearing officer or to seek his aid in procuring the attendance of the witnesses.

On the present appeal, the judgment of the district court was affirmed. 345 F. 2d 748. The court observed that "the witnesses who the complaint says were unavailable at the Civil Service hearing were in fact present, and the appellant did not inform the Air Force that certain other military personnel refused to appear at his request." 345 F. 2d at 748.

The decision of the court of appeals is clearly correct and presents no occasion for further review by this Court. Applying this Court's decision in *Williams* v. *Zuckert*, 371 U.S. 531, 372 U.S. 765, the courts below have found that petitioner failed to make a timely and sufficient attempt to obtain the presence

of the witnesses and that he failed to justify this failure.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

RALPH S. SPRITZER,
Acting Solicitor General.

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[1] Petitioner also argues that, as *Williams* v. *Zuckert* had not been decided at the time of the administrative proceedings in this case, he should be held entitled to the substantive right recognized by that case despite his failure to make timely demand. Since petitioner rejected respondents' offer to join in a request to the district court for a remand to the agency for a *de novo* hearing at which he would have full opportunity to request the presence of all desired witnesses, 228 F. Supp. at 414, petitioner certainly has no basis for complaint.

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